In the

United States Court of Appeals

For the Ninth Circuit.

No. 13,602.

JAMES V. McCONNELL AND
MARGOT MURPHY McCONNELL, *Appellants.*

vs.

PICKERING LUMBER CORPORATION, *Appellee.*

BRIEF FOR APPELLEE.

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INDEX.

Table of Cases.

INDEX—Continued.

Statutes.

Federal Rules of Civil Procedure.

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Basis of Jurisdiction.

The recitals of fact appearing on pages 1 and 2 of appellants' brief, under the heading of "Statement of Jurisdiction," are correct and, therefore, are not here repeated.

Proceedings in the District Court.

Likewise, the recitals of fact appearing on pages 2, 3 and 4 of appellants' brief, under the heading of "Proceedings in the District Court," are substantially correct.

STATEMENT OF THE CASE.

Appellants' "Statement of the Case" is not, in all respects, accurate or complete and is argumentative, and, therefore, unsatisfactory, and we will endeavor to make a plain and concise statement, presenting the questions involved and the manner in which they arise.

This action was commenced by appellants on August 23, 1951 (R. 24[1]). The original complaint sought recovery upon a written contract (attached to and made a part of the complaint as "Exhibit A"—R. 13-24) which was signed by the parties under date of April 10, 1946, or, in the alternative, to reform it upon the ground of "mutual mistake" but if not shown, then on the ground of "mistake of plaintiffs known or suspected by defendants" (R. 3-24).

Appellee moved to dismiss for failure of the complaint to state a claim upon which relief could be granted (R. 25). The court, on November 7, 1951, sustained that motion and dismissed the complaint (R. 26) because, said the court (R. 26-27), "*I do not find an ambiguity in the contract.* It is therefore not subject to the interpretation which plaintiffs would place upon it. The allegations of the complaint *do not set forth an agreement by the parties other than the writing herein to which it could be reformed.* The averments are insufficient to permit reformation on the ground of mistake * * *." But leave was granted (R. 27) "to file * * * an amended complaint setting forth sufficient allegations to present the question of the propriety of reforming the agreement herein."

[1]References to the Transcript of Record will be preceded by the letter "R" and, unless otherwise noted, references to appellants' brief will be preceded by "p" or "pp," and, unless otherwise noted, local citations are to the official reports, and emphasis in all quotations has been supplied by us.

On November 23, 1952, appellants filed a motion to vacate the order of November 7, 1951, sustaining appellee's motion to dismiss, upon the ground that "the same is contrary to law," and for leave to file an attached "amended complaint" (R. 27). On January 3, 1952, the court filed a memorandum granting appellants leave to file the amended complaint, and saying that appellants' motion to vacate the order of November 7, 1951, sustaining appellee's motion to dismiss the original complaint, would be considered upon submission of any motion attacking the amended complaint (R. 28, 29). Thereafter, on January 4, 1952, the "amended complaint" was filed (R. 29-40). The original complaint, being now an "abandoned pleading," will not be further noticed here.

The amended complaint (R. 29-40), omitting caption and jurisdictional averments, alleged, in substance, the following:

The appellants are husband and wife; that, on April 10, 1946, appellant Margot Murphy McConnell owned an undivided 248.2/1360ths interest (1126.33 acres if divided), appellee owned an undivided 272/1360ths interest (1234.336 acres if divided), John F. Ducey owned an undivided 494.8/1360ths interest (2245.402 acres if divided) and four others owned, collectively, an undivided 345/1360ths interest (1565.610 acres if divided), in 6172.60 acres of timbered lands in Tuolumne County, California, commonly known as the "McArthur and Ducey lands" (R. 29-31).

That on April 10, 1946, appellants and appellee made and entered into a written agreement concerning the acquisition by appellee of appellants' undivided fractional interest in those lands, which "Agreement, with its attached schedules A and B, is annexed hereto, marked 'Exhibit A' and by this reference incorporated herein" (R. 31). The agreement appears at pages 13 to 24 of the record.

That numbered paragraph 10-(A) of the Agreement reads as follows:

> "10-(A). Should Purchaser at any time prior to July 1, 1950, *acquire the 494.8/1360 fractional interest of John F. Ducey in the property listed in Schedule A* from him, his heirs or assigns or representatives, directly or indirectly, or at a partition sale of all the property described in Schedule A at a price higher than that provided herein for Sellers' interest, then Purchaser and Sellers hereby agree that the price provided in this contract for the Sellers' interest shall forthwith be adjusted upward by the amount necessary to make up the difference. Such additional amount shall be paid by Purchaser to Sellers as follows:
>
> > "(a). The additional amount due on all deeds taken up by Purchaser under this Agreement prior to the date of *purchase of such John F. Ducey interest* shall be paid by Purchaser to Escrow Agent for the account of Sellers within 15 days;
> >
> > "(b). The additional amount due on deed or deeds remaining in possession of Escrow Agent at date Purchaser *acquired the John F. Ducey interest* shall be paid by Purchaser to Escrow Agent for the account of Sellers when Purchaser calls on Escrow Agent for delivery of any or all such remaining deeds.
>
> "(B) The Purchaser further agrees with the Seller that, *in the event it should purchase the said John F. Ducey interest* at any time on or before July 1, 1950, that it will, within fifteen (15) days after making said purchase, mail to the address of the Seller, notice of said purchase and the terms and conditions of same."

That in February, 1949, appellants discovered that appellee had acquired, on or about December 9, 1947, the

494.8/1360 fractional interest of John F. Ducey *in 1599.22 acres of said lands,* at a price in excess of the rate of $75 per acre paid to appellants for their fractional interest in the McArthur and Ducey lands, and that they believe the price paid to Ducey was at the rate of approximately $150 per acre.

That appellee has never notified appellants of its purchase "of said John F. Ducey's interest as provided in subparagraph (B) of paragraph 10," of the Agreement, and has not paid any additional amount to the escrow agent for account of appellants.

That appellants have done all things required of them under the terms of the Agreement and that appellee, "in accordance with the provisions of said Agreement, owes plaintiffs an amount of money equal to the difference between the price of Seventy-five ($75) Dollars per acre heretofore paid by defendant corporation to plaintiffs and the higher price per acre heretofore paid by defendant corporation in acquiring said interest of said John F. Ducey," with interest.

That appellants are informed and believe that appellee rests its contention of nonliability "under the claim that the language of said paragraph 10 relieves it from the obligation to pay any additional amount to plaintiffs because it did not acquire, prior to July 1, 1950, the 494.8/1360 fractional interest of said John F. Ducey in all 154 parcels of said McArthur and Ducey lands, but only in 40 parcels thereof"; that appellants deny that the language of paragraph 10 of the Agreement "can be interpreted to excuse defendant corporation from paying to plaintiff an amount equal to the difference between the price of Seventy-five ($75) Dollars per acre paid to plaintiffs and the higher price per acre paid by the defendant corporation to said John F. Ducey," and allege that the

provisions of said paragraph 10 when "properly read, state that should defendant corporation, at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of said John F. Ducey *in all or in any parcels of the said lands* at a higher price" than was paid to appellants, then the price per acre paid to appellants "should be forthwith adjusted upward by the amount necessary to make up the difference."

The amended complaint is exactly the same as the original complaint to this point.

Then, going to the reformation matter, the amended complaint alleged that if the language of paragraph 10-(A) of the Agreement is susceptible of the interpretation placed upon it by appellee it does not truly express the intention of the parties thereto at the time made "and said Agreement *was executed by plaintiffs under a mistake on their part as to the meaning and effect thereof, which mistake was known or suspected by defendants,*" and that the circumstances giving rise to said mistake were as follows:

That appellants executed the Agreement "under the understanding and belief that Section 10-(A) meant plaintiffs should receive" an increased price if, prior to July 1, 1950, appellee purchased "said Ducey's interest *in all of or any of* said lands."

That soon after appellee acquired its undivided fractional interest in the McArthur-Ducey lands (alleged to be a 20% interest), in July, 1944, it commenced negotiations for the purchase of all outstanding interests therein; that it was necessary for appellee to acquire all outstanding interests in these lands before it could cut any timber thereon; that the negotiations were largely conducted between appellee and appellants; that all the coowners, except John F. Ducey, were willing to sell if a

fair price could be agreed upon; that in March, 1945, appellant Margot McConnell met with all co-owners in Detroit, Michigan, where it was agreed that all would sell at a price of $75 per acre, which was made known to appellee, and, in June, 1945, appellee prepared, signed and sent to the co-owners a written agreement for the purchase of their interests at that price; the proposed agreement was substantially in the same terms as the contract in suit, except it did not contain any provision similar to paragraph 10 of the contract in suit; that said proposed agreement was not executed because Mr. Ducey refused to sign it; that commencing in November, 1945, appellee began negotiations with appellants for the purchase of their interest alone and informed them that, if it could not acquire the interests of all the co-owners by agreement, acquisition of appellants' interest would improve its position in the event of a partition suit.

That from inception of appellee's efforts to acquire appellants' interest separately from those of the other co-owners, appellants refused to sell at a price of $75 per acre; that they informed appellee of such unwillingness and declared that they must receive "price protection" against the acquisition by appellee, prior to July 1, 1950, of any of the other interests at a higher price; that it was later orally agreed that any such price protection clause which might finally be agreed upon would refer only to any higher price paid to John F. Ducey, in view of the size of his fractional interest and his past unwillingness to sell.

That during February, 1946, John F. Ducey and three other co-owners offered to sell their respective interests to appellee for $100 per acre, and so informed appellants; that later that month the president of appellee went to New York and there offered, on behalf of appellee, to sign

two agreements with appellants, one at $75 per acre, which could be shown to the other co-owners, and the other at a higher price which would be a "private agreement" between the parties; that appellants refused to consider that offer.

That "*it was thus apparent to plaintiffs that defendant corporation desired to acquire all outstanding interests in said property and plaintiffs believed that it would do so* prior to July 1, 1950, at a price or prices in excess of $75 per acre."

That on or about April 4, 1946, appellee prepared and sent to appellants for signature the Agreement in suit which was signed by both parties.

That during July, 1951, appellants learned from an inspection of official records of Tuolumne County, California, that appellee had agreed, prior to July 1, 1950, with all co-owners, other than John F. Ducey, for acquisition of all of their interests in these lands at a price which appellants believe was in excess of $75 per acre.

That "*The contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey in a part of but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation,*" but that appellants "understood and believed" and appellee "knew or suspected" that appellants understood and believed that appellants would receive the difference between $75 per acre and any higher price per acre which might be agreed upon between appellee and John F. Ducey at any time prior to July 1, 1950.

The amended complaint they prayed:

1. That the court declare appellants to be entitled, under the terms of the Agreement, to receive such amount as may be found necessary to make up the difference between the price of $75 per acre paid to appellants and

any higher price per acre paid to John F. Ducey for his interest "in certain parcels of said land," with interest.

2. That if the language of the contract "does not mean what plaintiffs claim it means" that the Agreement be reformed *"by the addition of the words 'any of' after the word 'in' and preceding the words 'the property listed' in the third line of paragraph 10-(A) of said Agreement."*

3. That the court decree that under the Agreement, *"so reformed,"* appellee owes appellant such amount as may be found to be the difference between $75 per acre at which appellee acquired appellants' interest in these lands, and any higher price per acre at which appellant acquired the interest of said John F. Ducey "in a part of said lands" together with interest.

Thereafter on January 25, 1952, appellee served and filed its motion to dismiss the amended complaint upon the ground that it fails to state a claim upon which relief can be granted (R. 41). That motion to dismiss was briefed and argued before the court (R. 78) but the court, by order of March 26, 1952, decided to defer ruling thereon until the trial (R. 41). Appellee then filed its answer setting up, as its first defense, that "The amended complaint fails to state a claim against defendant upon which relief can be granted" (R. 42-45).

On September 3, 1952, the District Judge filed an elaborate "Memorandum and Order" (R. 47-77) sustaining appellee's motion to dismiss the amended complaint, pointing out, in great detail, the reasons and authorities that compelled his action, and he concluded (R. 76):

> 1. "Insofar as the claim for relief on the contract as it stands is concerned, it is admitted that the plaintiffs have left their pleadings unchanged. Accordingly, the court adheres to its ruling of November 7, 1951, to the effect that there is no ambiguity in the contract in its present form.

2. "In their Amended Complaint, the plaintiffs have failed (a) to set out any pre-existing agreement according to which the contract should be reformed, and (b) to give a cogent and persuasive explanation as to how they came to make their alleged 'unilateral mistake.'

3. "Finally, the Amended Complaint is barred by the three-year statute of limitations, insofar as it relates to the reformation of the contract.

4. "Accordingly, the Amended Complaint is dismissed, and judgment is rendered in favor of the defendant."

On September 16, 1952, the court entered judgment (R. 77), adjudging that appellee's motion to dismiss appellants' amended complaint "be and the same is hereby granted and plaintiffs' amended complaint is hereby dismissed with prejudice; and judgment is hereby rendered in favor of the defendant and against the plaintiffs, and * * * plaintiffs' motion to vacate the order of this Court of November 7, 1951, dismissing plaintiffs' original complaint, as being contrary to the law, be and the same is hereby denied."

From that judgment appellants have appealed to this Court (R. 79) contending, in substance, in their "Specification of Errors Relied Upon" (p. 10), that the District Court erred in holding: (1) that the amended complaint does not state a claim upon which relief can be granted upon the contract as written, (2) that the amended complaint does not state a claim upon which relief can be granted to reform the contract, (3) that the amended complaint shows on its face that the action for reformation of the contract is barred by the Statute of Limitations, and (4) that the court, after deciding on March 26, 1952, to defer ruling on appellee's motion to dismiss the amended complaint until the trial, and after answer was

filed and depositions taken and the case set for trial, erred in dismissing the amended complaint with prejudice and entering judgment for appellee, without further notice, hearing, pre-trial conference or any motion for judgment on the pleadings.

Summary of the Argument.

1. There is no uncertainty or ambiguity in the contract as written. The questioned clause of paragraph 10-(A) of the contract says (R. 16), "Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey *in the property listed in Schedule 'A,'* " at a higher price than paid to appellants for their fractional interest in said lands, a price adjustment would be due appellants. Inasmuch as the amended complaint alleges that appellee acquired Ducey's fractional interest in only 1599.22 acres (R. 33), or in only about 25 per cent of the 6,171.68 acres "listed in Schedule 'A' " (R. 24 and 31), it follows that the amended complaint did not state a claim upon which relief could be granted upon the contract as written.

2. Appellants ask "reformation" of the contract as written by adding to the questioned clause of paragraph 10-(A) the words "any of" after the word "in" and preceding the words "the property listed" (R. 40), so that "as reformed" the clause would read: "Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey in *any of* the property listed in Schedule 'A.' "

Appellants do not allege that the parties ever agreed to those terms, but in very truth the amended complaint alleges exactly the contrary, by saying (R. 39), "The contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey *in a part of but less*

*than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation, * * *.*''

Thus appellants do not allege that the contract failed to record the *real agreement* of the parties. They do not allege that the parties had agreed that the questioned clause of paragraph 10-(A) of the contract was to say ''in *any of* the property listed in Schedule 'A,' '' rather than to say, as it does say, ''in the property listed in Schedule 'A,' '' which was 6,171.68 acres. In fact, they say the exact contrary by alleging (R. 39), as above quoted, that such matter ''was not discussed.''

Therefore appellants do not allege an agreement of the parties, other or different than the one written and signed, to which the written contract should or could be reformed. The effect is that appellants seek to remake the contract to suit themselves—not to reform it to make it accord with the *real agreement* of the parties, which, from all that appears in the amended complaint, it already does.

Therefore the amended complaint fails to state a claim upon which reformation could be granted.

3. The written contract in suit was signed April 10, 1946 (R. 17). This action to reform that contract was filed August 23, 1951 (R. 24), more than five years after execution of the contract. Appellants allege (R. 35) that they executed the agreement ''under a mistake on their part as to the meaning and effect thereof,'' without in any way explaining why their alleged mistake could not, with reasonable diligence, have been discovered within three years from the making of the contract, and, therefore, the complaint for reformation is barred by the California three-year Statute of Limitations (Section 338(4) of the California Code of Civil Procedure).

4. The action of the District Court in ruling on appellee's motion to dismiss the amended complaint after answer was filed and depositions were taken and the case set for trial, without further hearing, pre-trial conference or any motion for judgment on the pleadings, was neither irregular nor in any way prejudicial to appellants.

ARGUMENT.

Appellants are not entitled to relief on the contract as written and signed.

The written contract is attached to and made a part of appellants' amended complaint. It is clear, certain and unambiguous.

Appellants' whole case, upon the contract as written, is based upon their palpably erroneous contention that the last seven words of the clause in paragraph 10-(A) of the contract reading, "Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey *in the property listed in Schedule 'A'* " (R. 16), mean "in all or in any parcels of the said lands" (R. 35).

Appellants make this contention even though they admit such was never agreed to, by alleging, in their Amended Complaint (R. 39), that "the contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey *in a part of but less than all of said lands was not discussed during the negotiations.*"

The language "in the property listed in Schedule 'A' " certainly does not mean "in all or in any parcels of the said lands," as appellants contend.

It is fundamental law that, when an unambiguous contract is attached to and made a part of the complaint, the terms of the contract, and not what the pleader alleges, is determinative. In *Foshee* v. *Daoust Construction Co.,* 7 Cir., 185 F. 2d 23, 25 (1950), the court pointed out that "where the allegations of a pleading are inconsistent with the terms of a written contract attached as an exhibit, the terms of the latter, fairly construed, must prevail over

the averments differing therefrom. (Cases cited.)"[2] This rule applies with equal force on a motion to dismiss. In *Zeligson* v. *Hartman-Blair, Inc.*, 10 Cir., 126 F. 2d 595, 597 (1942) the court declared, "The motion to dismiss admitted all facts well pleaded, but it did not admit the legal effect ascribed by the pleader to the writing. The writing was attached to the first amended complaint as an exhibit and its legal effect is to be determined by its terms rather than by the allegations of the pleader."[3]

The familiar rule that parol evidence is not admissible to alter, vary or contradict the terms of a written contract is so ingrained in the law of California as to be codified in a statute. Section 1625 of the California Civil Code provides:

> "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

We must turn, then, to the contract itself to determine the intention of the parties.

The questioned clause in the contract is clear, definite, certain and of single meaning, and it means what, and only what, it plainly says, namely, "Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey in the property listed in Schedule 'A'" at a price higher than paid to appel-

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[2]See also *Pelelas* v. *Caterpillar Tractor Co.*, 7 Cir., 113 F. 2d 629, 631 (1940), certiorari denied, 311 U. S. 700 (1940); *Sinclair Refining Co.* v. *Stevens*, 8 Cir., 123 F. 2d 186, 189 (1941), certiorari denied, 315 U. S. 804 (1942); *Zeligson* v. *Hartman-Blair, Inc.*, 10 Cir., 126 F. 2d 595, 597 (1942); *Eaves* v. *Timm Aircraft Corp.*, 107 C. A. 2d 367, 370 (1951).

[3]To the same effect are *St. Louis K. & S. E. R. R. Co.* v. *United States*, 267 U. S. 346; *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25; *Flanigan* v. *Security-First National Bank of Los Angeles*, D. C. S. D. Cal., 41 F. Sup. 77, 79 (1941); *DeLoach* v. *Crowley's, Inc.*, 5 Cir., 128 F. 2d 378, 380 (1942).

lants for their fractional interest in said lands, then a price adjustment would be due appellants. It is, we believe, impossible to comprehend how that clause could be more definite or certain. It is, also, we believe, inconceivable that the clause could have more than one significance to reasonable men, or could possibly mean "any of the property listed in Schedule 'A,' " as appellants argue.

Appellants argue (p. 13) that, in view of the liberality in pleading allowed by Federal Rules of Civil Procedure that "only that need be stated that gives a fair notice to the opponent of the general nature of the cause of action," and they cite cases (pp. 13, 14) holding that "it is error to dismiss a complaint with prejudice if it appears that any relief could be granted on the facts stated."

We agree that it is error to dismiss a complaint with prejudice if it appears that relief could be granted on the facts stated. Here, however, the questioned phrase reading "in the property listed in Schedule 'A' " as a matter of law does not mean, as appellants claim for their basis of recovery, "in all or in any parcels of said lands," and, therefore, no "relief could be granted on the facts stated."

Appellants say (p. 16) that the District Court's construction of the contract "carries no weight in this court" and they there cite cases holding that "an appellate court is not bound by a trial court's construction of a contract or other written instrument based solely upon the terms of the instrument." While we agree that this Court is not bound by the District Court's construction of the terms of the contract—for that is a question of law—we do believe that it is both incorrect and unseemly to say that the District Court's construction of the contract "carries no weight in this Court."

Appellants argue (p. 17) that inasmuch as appellee prepared the contract it must be construed against it,

and they there cite and quote in full Section 1654 of the Civil Code of California (which deals only with "cases of uncertainty" in contracts), and Section 1649 of the Civil Code of California (which deals only with contracts "in any respect ambiguous or uncertain"), and Section 1864 of the Code of Civil Procedure of California (which deals only with contracts subject to "two constructions"). Obviously none of those sections has any application here because the questioned clause of the contract is not uncertain, ambiguous or subject to two constructions, and there is no room for construction.

Appellants say (p. 17), "Also alleged are the opposite interpretations which the parties have placed upon it." They thus appear to take the position that their bare allegations of their own mistaken understanding of the terms of the contract render it uncertain or create an ambiguity. Of course that is not the law. That position is directly met in *Eaves* v. *Timm Aircraft Corp.,* 107 C. A. 2d 367, 237 Pac. 2d 287 (1951), where the court said (p. 290):

> "Plaintiff seeks to recover not upon the contract as written but as enlarged in material respects by defendant's representations as to its meaning wholly at variance with its unambiguous expressions. Such recovery under the guise of interpretation may not be allowed where the terms used are unambiguous and have no local or technical meaning."

Appellants argue (p. 18) that if the contract be enforced as written it would result in an absurdity in that "appellee could always escape its own promise by omitting from its future purchase a single parcel, or even a fraction of one parcel." That argument is wholly without merit. Any such evasive subterfuge would be squarely

met by the rules of "diminimus" and of "substantial performance."

But if appellants were allowed to rewrite the phrase "in the property listed in Schedule 'A' " to say, as they would like, "in all or in any parcels of the said lands" then they would thereby inject real uncertainty into the contract—uncertainty as to whether the price advance was to apply only to that portion of the property listed in Schedule A in which Ducey's interest has been purchased, or to all the property listed in Schedule A, and thus the present clear terms of the contract really would be rendered ambiguous.

Appellants say, and cite cases holding (pp. 19-21), that the contract should be construed as a whole. Surely so. That is exactly what was done. Not only is the questioned clause in paragraph 10-(A) of the contract clear in itself but, moreover, consistently therewith and inconsistent with appellants' claims, paragraph 10-(A)(a) (R. 17) refers "to the date of purchase of such John F. Ducey interest" and paragraph 10-(A)(b) (R. 17) employs the phrase "at date Purchaser acquired the John F. Ducey interest," and paragraph 10-(B) (R. 17) uses the phrase "in the event it should purchase the said John F. Ducey interest." Everything in the contract is consistent with the fact that the clause in paragraph 10-(A) of the contract reading "in the property listed in Schedule A" means in the 6,171.68 acres "listed in Schedule A," and is inconsistent with plaintiffs' claim that it means "in all or in any parcels of said land."

Appellants are virtually forced to concede that the phrase "in the property listed in Schedule 'A,' " as used in the contract, could only have referred to the 6,171.68 acres "listed in Schedule A," for they allege (R. 39), "The contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey *in a part of but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation.*"

But the crux of appellants' contention is (p. 23) that there is a "latent" or "extrinsic" ambiguity in the questioned phrase *not appearing "on the face of the contract" and that they are entitled to offer parol evidence "to prove that an extrinsic or latent ambiguity arose after the contract was signed, by appellee's purchase of the Ducey interest in part of the property, and to explain its meaning in the light of this subsequent event."* But they do not allege any facts constituting a latent or extrinsic ambiguity.

In claimed support of their position they cite *Pacific Ind. Co.* v. *California Electric Works,* 29 Cal. App. 2d 260, 272, 84 Pac. 2d 313 (1938); *Estate of Donnellan,* 164 Cal. 14, 127 Pac. 166 (1912); *Estate of Dominici,* 151 Cal. 181, 90 Pac. 448 (1907); *F. P. Cutting Co.* v. *Peterson,* 164 Cal. 44 (1912); *Barham* v. *Barham,* 33 Cal. 2d 416, 202 Pac. 2d 789 (1949), and *Millett* v. *Taylor,* 26 Cal. App. 161, 146 Pac. 42 (1914). Each and every one of those cases involved an ambiguity or uncertainty in a contract or in a will and not one of them supports appellants or has any application to an action on a clear and unambigu-

ous contract such as this. They in fact hold that, even in a suit on an ambiguous contract, extrinsic parol evidence is not admissible to show a different intent from that disclosed by the language of the instrument.[4]

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[4]The *Pacific Indemnity Co.* case involved an ambiguity as to who were the obligees in a contract of indemnity. The court held that parol evidence was admissible to solve the ambiguity, and said: "The rule, therefore, is that if there is any reasonable room for doubt as to what the contract means or as to what the exact words thereof apply to, then parol evidence is properly admitted."

In Re Donnellan's Estate involved an ambiguity in decedent's will as to the identity of a legatee. It gave a legacy "to my niece, Mary, a resident of New York, said Mary being the daughter of my deceased sister, Mary." Decedent's deceased sister, Mary, had two daughters. One named Mary, who lived in Ireland and had never been in New York, another named Annie, who long had lived in New York, and the question was which was intended to have the legacy—the one whose name was stated in the will or the one who lived in New York. The court held that parol evidence was admissible to determine this extrinsic ambiguity and said, "Again, it is fundamental that in all cases where extrinsic evidence is admissible to aid in expounding the will the evidence is limited to this single purpose. It is considered for the purpose of explaining and interpreting the language of the wll, *and is never permitted to show a different intent or a different object from that disclosed though, perhaps obscurely, by the language of the will itself.*"

In Re Dominici's Estate involved almost the same situation and exactly the same ruling as *In Re Donnellan's Estate.*

The *Cutting Comany* case involved a contract for the sale and future delivery of canned tomatoes. The price to be reduced if the "opening *printed* prices for the season" of a trade association were less than stated in the contract. The association did not *print* an opening price list for the season but announced prices less than the contract prices. Defendant, when sued for the contract prices, sought reformation on the ground of "mutual mistake" *in that both parties contracted in view of the opening prices to be announced by the association and expected them to be printed.* The trial court denied reformation, but on appeal his action was reversed on the ground that mutual mistake was shown and the court said, "If they (plaintiffs) had declared that they did not then (when the contract was signed) expect that the price list would be printed, and that they approved the wording with that idea, it would be a virtual confession that they believed that the guaranty would be nugatory and intended to perpetrate *a fraud* upon the defendant if a lower price was fixed by the association without printing the price list. The mistake would then come within the class of mistakes described in Section 3399 as 'a mistake of one party, which the other at the time knew or suspected.' "

The *Barham* case involved an antenuptial agreement made between a husband and wife who were later divorced and who subsequently remarried. The contract was ambiguous (as to whether it controlled marital rights acquired by the second marriage) and was susceptible to two constructions. The court held that, in such a case, extrinsic evidence was admissible, saying, "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties * * *, not to show that the parties meant something other than what they said but to show what they meant by what they said."

In this case, however, as said by the District Court (R. 61), "There is no ambiguity, either extrinsic or intrinsic, in the contract. If there was any misconception or misapprehension regarding the agreement, it existed in the minds of the plaintiffs alone. The mistake, if any, was purely subjective with them * * *."

Appellants' contention is squarely met by the applicable California cases. In *Barnhart Aircraft, Inc.*, v. *Preston*, 212 Cal. 19, 21-22, 23-24, 297 Pac. 20 (1931), the Supreme Court of California, after quoting Section 1856 of the California Code of Civil Procedure (set forth in full in the District Court's opinion at R. 61) referred approvingly to the following language by Jones in his Commentaries on Evidence, Vol. 3, Section 454:

> " '* * * ambiguity in a written contract, calling for construction, may arise as well from words plain in themselves but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense * * *. *Such an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful.*
>
> " 'It must be borne in mind that although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, *yet no other words can be added to or substituted for those of the writing.* The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language.' "

The *Millett* case involved a lease saying that lessees would give the lessors "one equal half part of all the proceeds and crops produced on said farm." The court held that this language was so indefinite as to whether gross or net proceeds were meant that extrinsic parol evidence was admissible to explain the ambiguity.

In *Eastern-Columbia* v. *System Auto Parks, Inc.,* 100 C. A. 2d 541, 545, 224 Pac. 2d 37 (1950), the court said on this point:

> "If the language of the instrument is clear and explicit the intention of the parties must be ascertained from the writing alone. Parol evidence is admissible only where the language used is doubtful, uncertain or ambiguous and only then in cases where the doubt appears upon the face of the contract."

In *United Iron Works* v. *Outer Harbor Dock & Wharf Co.,* 168 Cal. 81, 141 Pac. 917 (1914), the court said:

> "Appellants undertook by parol evidence of the 'surrounding circumstances' to show that there was such a warranty given even if it were not expressly embodied in the written contract. The objections to the admission of this evidence were sustained, and this is the first one of the asserted errors; the contention being that under Section 1647 of the Civil Code and Section 1860 of the Code of Civil Procedure such evidence was clearly admissible. In this, however, appellant errs. These sections but enact the common-law rule. It was never within their contemplation that a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.'
>
> "This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said."

In *Russell* v. *Stilwell,* 106 Cal. App. 88, 92, 288 Pac. 785 (1930), the court, on a very similar question, said:

> "We can see but one construction that can be placed upon the words in the added clause 'the com-

> pletion of the plans,' and that is all plans beforementioned in the contract—not merely preliminary plans. The words themselves require no explanation. If they did it could be found in the contract itself. In the absence of fraud, where the parties have reduced to writing what appears to be a complete and certain agreement, parol evidence will not be permitted for the purpose of varying the written contract."

This Court in the case of *Black* v. *Richfield Oil Corp.*, 9 Cir., 146 F. 2d 801, 804 (1945), had the following to say on this point:

> "The California law is admittedly controlling. A statute of that state (Section 1858, Cal. Cod. Civ. Proc.) provides that in the construction of an instrument, 'the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted.' The local decisions, like those of the courts elsewhere, are in harmony with the elementary principles declared by the statute."

Appellants argue (pp. 24-25) that the District Court in saying in his opinion (R. 63) that, "Generally speaking, we may say that 'the property,' as used in the present contract, means 'all the property,' " added the word "all" to the questioned clause and that this addition of a word proves that the questioned clause is ambiguous. It is too obvious for debate that the appellants' premise is erroneous. The District Court did not add the word "all," or any words, to the questioned clause of the contract. He merely defined what it means in other words. Certainly in defining a word or phrase in a contract it is necessary to use other words, else you do not define; but by so defin-

ing you do not add the words of the definition to the instrument.

The questioned clause of the contract says, "Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey *in the property listed in Schedule 'A,'* " at a higher price than paid appellants, then a price adjustment would be due appellants (R. 35). Appellees are alleged to have purchased, in that time, Ducey's interest in only 1599.22 acres, or about 25 per cent, of the 6,172.60 acres "listed in Schedule 'A' " (R. 24, 31), and appellants allege that "the contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey in a part of but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation," and, therefore, appellants' amended complaint clearly failed to state a claim upon which relief could be granted upon the contract as written, and it follows that the court's action in sustaining appellee's motion to dismiss the complaint, as to the claim on the contract as written, was clearly right.

The amended complaint shows on its face that appellants are not entitled to a reformation of the contract.

Appellants seek "reformation" of the contract as written by adding to the questioned clause of paragraph 10-(A) the words "any of" after the word "in" and preceding the words "the property listed" (R. 40), so that "as reformed" the clause would read: "Should Purchaser at any time prior to July 1, 1950, acquire the 494.8/1360 fractional interest of John F. Ducey in *any of* the property listed in Schedule 'A,' " at a higher price than paid appellants, then a price adjustment would be due appellants.

Appellants do not allege that the parties ever agreed to those terms, but in very truth the amended complaint alleges exactly the contrary, by saying (R. 39), "The contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey *in a part of but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation,* * * *."

Thus appellants do not allege that the contract in suit failed to record the *real agreement* of the parties. They do not allege that the parties had agreed that the questioned clause of paragraph 10-(A) of the contract was to say "in *any of* the property listed in Schedule 'A,' " rather than to say, as it does say, "in the property listed in Schedule 'A,' " which was 6171.68 acres. In fact, they say the exact contrary by alleging (R. 39), as above quoted, that this matter "was not discussed."

Therefore appellants do not allege an agreement of the parties, other or different than the one written and signed, to which the written contract should or could be reformed.

But appellants say that inasmuch as they alleged in the amended complaint (R. 36) that they "executed said agreement under the understanding and belief that Section 10-(A) thereof meant plaintiffs should receive as the price of their interest in said McArthur-Ducey lands an amount equal to the difference between $75 per acre and any higher price per acre provided in any agreement between defendant corporation and said John F. Ducey made at any time prior to July 1, 1950, for the sale of said Ducey's interest in all of or any of said lands" and that (R. 35) "said agreement was executed by plaintiffs under a mistake on their part as to the meaning and effect thereof, which mistake was known or suspected by

defendants at the time of the execution thereof" it is unnecessary for appellants to allege that the parties made a definite agreement covering the subject prior to the written contract and that the written contract does not conform to the real agreement of the parties and should be reformed to do so, arguing (p. 32) that "it is not necessary to plead and prove two agreements."

Certainly it is not necessary, or even possible, in a reformation case, "to plead and prove two agreements," but it is necessary to plead that the parties made a definite agreement, covering the subject, prior to the writing and that the writing, through mistake or fraud, fails to correctly set forth the *real agreement* of the parties to which the writing should be reformed.

Plaintiffs cite cases[5] which they claim support their contention but examination of them discloses that in every instance a definite agreement pre-existed the instrument sought to be reformed and asked reformation of the writing to accord with the real agreement of the parties.

This is just plain common sense for it is obvious that you cannot "reform" a written contract to make it say something never agreed to by the parties. That would be to remake, not reform, a contract. You cannot "reform" to something that never existed. You cannot "reform" something to nothing. That would be to chase a negative through a vacuum.

The law is well settled in California that before a contract can be reformed on the ground of fraud, or mistake of any kind, including unilateral mistake or mistake of one party, the plaintiff must plead and prove a definite

[5]*Auerback* v. *Healy*, 174 Cal. 60, 63, 161 Pac. 1157 (1916); *F. P. Cutting Co.* v. *Peterson*, 164 Cal. 44, 50, 127 Pac. 163 (1912); *Burton* v. *Curtis*, 91 Cal. App. 11, 13, 266 Pac. 1029 (1928); *Bank of America* v. *Granger*, 115 Cal. App. 210, 220, 1 Pac. 2d 479 (1931); *Eagle Indemnity Co.* v. *Ind. Acc. Comm.*, 92 Cal. App. 2d, 222, 229, 206 Pac. 2d 877.

agreement that pre-existed the instrument sought to be reformed.

The very first case cited on this point by appellants of *Auerback* v. *Healy,* 174 Cal. 60, 63, 161 Pac. 1157 (1916), is a leading case against them. There the Supreme Court of California said on the point (pp. 62-63):

> "The rules of pleading in actions for the reformation of contracts are well established, and should be familiar. The complaint should allege 'what the real agreement was, what the agreement reduced to writing was, and where the writing fails to embody the real agreement.' (34 Cyc. 972.)"

The recent California case of *Bailard* v. *Marden,* 36 C. 2d 703, 708-709, 227 Pac. 2d 10, settles this question, in California, beyond all controversy. There the plaintiffs alleged both a mutual mistake and their own unilateral mistake. The court said:

> "The purpose of reformation is to effectuate the common intention of both parties which was incorrectly reduced to writing. To obtain the benefit of this statute (Section 3399), *it is necessary that the parties shall have had a complete mutual understanding of all the essential terms of their bargain; if no agreement was reached, there would be no standard to which the writing could be reformed.*
>
> "Otherwise stated, *'(I)nasmuch as the relief sought in reforming a written instrument is to make it conform to the real agreement or intention of the parties, a definite intention or agreement on which the minds of the parties had met must have pre-existed the instrument in question.'* (Authorities cited.) *Our statute adopts the principle of law in terms of a single intention which is entertained by both of the parties.*
>
> "Courts of equity have no power to make new contracts for the parties, * * * (N) *or can they reform an*

instrument according to the terms in which one of the parties understood it, unless it appears that the other party also had the same understanding. (22 Cal. Jur. Section 2, p. 710). If this were not the rule, the purpose of reformation would be thwarted."

Inasmuch as the amended complaint does not allege a definite agreement, or any agreement, between the parties, pre-existing the written contract in suit there is no standard to which the contract in suit could be reformed, and inasmuch as the amended complaint says (R. 39) "The contingency of the purchase by defendant corporation of the fractional interest of John F. Ducey in a part of but less than all of said lands was not discussed during the negotiations between plaintiffs and defendant corporation" there is no basis whatever for "reforming" (actually rewriting) the questioned clause of the contract by adding, as appellants ask (R. 40), the words "any of" after the word "in" and preceding the words "the property listed" so as to make said clause read "in *any of* the property listed in Schedule 'A'."

It follows that the amended complaint failed to state a claim upon which relief could be granted by way of reformation of the contract and the action of the court in sustaining appellee's motion to dismiss was undoubtedly correct.

The amended complaint shows on its face that the action for reformation is barred by limitations.

The written contract in suit was signed April 10, 1946 (R. 17). This action to reform that contract was filed August 23, 1951 (R. 24), more than five years after execution of the contract.

Appellants allege (R. 35) that they executed the agreement "under a mistake on their part as to the meaning

and effect thereof." They do not in any way explain why their alleged mistake could not, with reasonable diligence, have been discovered within three years from the making of the contract.

Rule 9(f) of Federal Rules of Civil Procedure, provides: "For the purpose of testing the sufficiency of a pleading; averments of time * * * are material * * *."

This Court in the case of *Suckow Borax Mines, Consolidated, Inc.* v. *Borax Consolidated, Ltd.*, 9 Cir. 185 F. 2d 196 (1950), said that:

> "* * * a complaint may properly be dismissed on motion for failure to state a claim when the allegations in the complaint affirmatively show that the complaint is barred by the applicable statute of limitations. This is because Rule 9(f) makes averments of time and place material for the purposes of testing the sufficiency of a complaint (many cases cited)."

Where there is no applicable Federal statute of limitations, the statute of the state in which the action is brought controls.[6]

Section 338(4) of the California Code of Civil Procedure provides that "An action for relief on the ground of * * * mistake" must be brought within three years, but "The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

In an effort to escape the effect of the statute of limitations, appellants alleged in the amended complaint (R. 33) that:

> "During the month of February, 1949, plaintiffs discovered that theretofore and on or about Decem-

[6] *Johnson* v. *Greene*, D. C. Cal., 14 F. Sup. 945, 947 (1936), affirmed, 9 Cir., 88 F. 2d 683 (1937); *Latta* v. *Western Inv. Co.*, 9 Cir., 173 F. 2d 99, 107 (1949).

> ber 9, 1947, defendant corporation had acquired the 494.8/1360 fractional interest of John F. Ducey in and to certain parcels of said McArthur and Ducey lands," etc.

Although, under the terms of Section 338(4), the statute does not start to run until such time as the mistake or fraud is discovered, the cases are unanimous in holding that the statute begins to run at the time when plaintiff, with reasonable diligence, could have ascertained the facts.[7]

The party seeking to avoid the bar of the statute must plead facts excusing failure to make earlier discovery of the mistake, and, failing to do so, as appellants have here, the statute is not tolled.

In *Bradbury* v. *Higginson,* 167 Cal. 553, 558, 140 Pac. 254 (1914), the Supreme Court of California said (p. 255, 256):

> "It is true that the answer avers that the defendant did not discover the mistake until August, 1909, which was within three years of the filing of the answer. But a mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute (cases cited). It is necessary for the party seeking to avoid the bar to affirmatively plead facts excusing the failure to make an earlier discovery of the mistake or fraud relied upon."[8]

The California law is clearly to the effect that an action for reformation of a contract may be barred by limi-

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[7]*Simpson* v. *Dalziel,* 135 Cal. 599, 67 Pac. 1080 (1902); *Montgomery* v. *Peterson,* 27 Cal. App. 671, 151 Pac. 23 (1915); *Shain* v. *Sresovich,* 104 Cal. 402, 38 Pac. 51 (1894).

[8]See also *Johnson* v. *Ware,* 58 C. A. 2d 204, 207, 136 Pac. 2d 101, (1943); *Prentiss* v. *McWhirter,* 9 Cir., 63 F. 2d 712 (1933).

tations even though the time for bringing a suit on the contract itself has not yet run. This question was squarely decided in the case of *Bradbury* v. *Higginson, supra,* 167 Cal. at page 559 where the court, referring to *Gardner* v. *California Guarantee Co.,* 137 Cal. 71, 69 Pac. 844, said as follows:

> "The opinion in the Gardner case contains, further, an expression to the effect that an action for the reformation of a contract is not barred so long as an action on the contract itself might be brought. If this be the correct rule, we do not consider it applicable to a case like the one before us, *where the reformation is not merely incidental to the main relief sought, but is an essential prerequisite to the asking of any relief.*"

Appellants seek to avoid the effect of the statute by relying upon the provisions of paragraph 10-(B) of the contract (R. 17), providing "In the event it (appellee) should purchase the said John F. Ducey interest at any time on or before July 1, 1950, that it will, within fifteen (15) days after making said purchase, mail to the address of the Seller, notice of said purchase and the terms and conditions of same," and upon the fact that appellee did not advise them of its purchase of Ducey's interest in a part of the lands.

The complete answer is that appellee did not "purchase the said John F. Ducey's interest" in the 6171.68 acres of land "listed in Schedule A" attached to the contract, but in only 1599.22 acres, or about twenty-five per cent, of the 6172.60 acres "listed in Schedule A," and since appellee did not "purchase the said John F. Ducey's interest" "in the property listed in Schedule 'A' " appellee was not required to give appellants the notice specified in Section 10-(B) of the contract.

Inasmuch as the contract in suit was signed April 10, 1946, and this action to reform it was not filed until August 23, 1951, more than five years after execution of the contract, and inasmuch as appellants do not allege facts showing that they could not have discovered their claimed mistake within three years from the making of the contract, it follows that the amended complaint shows upon its face that the action for reformation of the contract is barred by limitations.

The action of the District Court in ruling on appellees' motion to dismiss the amended complaint after answer was filed and depositions were taken and the case set for trial, without further hearing, pretrial conference or a motion for judgement on the pleadings, was neither irregular nor in any way prejudicial to appellants.

Appellants argue (p. 41) that the court erred in deciding "the case on its merits at the pleading stage without permitting appellants to have their day in court." Appellee's motion to dismiss the amended complaint followed the method prescribed by Federal Rule of Civil Procedure 12(b), (6), for challenging the legal sufficiency of the complaint to state any cause of action against appellee. The court was bound to pass upon that motion. How could it be error for the court to pass upon that motion "at the pleading stage"? And it seems to us to be ridiculous to argue that the sustaining of the motion denied appellants "their day in court" for, certainly, it would be idle for a court to, and he never should, waste the time and incur the expense involved in going through a trial and hearing witnesses to establish the facts which the pleadings admit. Surely, to allow a litigant his day in court, the judge is not deprived of the right, nor relieved from the duty, of passing upon a pending motion to dismiss the complaint, and the litigant has "his day in court"

equally whether the facts are established on evidence or are admitted by the pleadings. One cannot profitably elaborate a truth so simple.

Appellants further argue that the court should have resorted to a pretrial conference. Why? There were no issues of fact to be settled. The question before the court was one of law on facts contained in the amended complaint and admitted by the motion to dismiss. Pretrial conference could not have changed the facts or the law and would have been idle.

Appellants also argue that appellee could have filed a "speaking motion" under Rule 56 "whereby the court would have been properly informed as to the positions of the respective parties." Appellee did not so move. Its position was, and is, that the amended complaint "fails to state a claim upon which relief can be granted," and, to present that question, it followed the prescribed procedure of Rule 12(b) and filed a motion to dismiss upon that ground, and that issue had to be decided by the court. A motion for summary judgment, under Rule 56 (called by appellants a "speaking motion") was not called for, because appellee was not contending that "depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact," but was contending simply that the amended complaint failed to state any cause of action against appellee and, hence, of course, the appropriate means of raising that question was a motion to dismiss.

We emphasize that here the court was very liberal with appellants. After sustaining appellee's motion to dismiss the original complaint and telling appellee that he did so, as to the action on the contract as written, because (R. 26) "I do not find an ambiguity in the contract," and that he did so, as to the action for reformation, be-

cause (R. 27) "the allegations of the complaint do not set forth an agreement by the parties other than the writing herein to which it could be reformed," he granted leave to appellants (R. 27) "to file * * * an amended complaint setting forth sufficient allegations to present the question of the propriety of reforming the agreement herein." Yet appellants' amended complaint left the averments of the action on the contract unchanged, and did not, on the reformation issue, "set forth an agreement by the parties other than the writing herein to which it could be reformed."

The court having thus pointed out to appellants precisely the deficiencies in their complaint, and having thus given them two opportunities to meet those deficiencies, and appellants having shown in their amended complaint that there was no agreement between the parties antedating the writing, there was nothing left for the court to do but pronounce the judgment of the law on the facts alleged by the amended complaint and admitted by the motion to dismiss, which required the entry of judgment for appellee.

Conclusion.

Before concluding we want to take this opportunity to say that the opinion of the District Court is as temperate, thorough, well reasoned and sound as any we have been privileged to see in a long time, and it is doubtful that any judge could improve upon it.

In conclusion we submit that it is clear beyond debate that appellants' amended complaint failed to state a claim upon which relief could be granted and the action of the court in sustaining appellee's motion to dismiss and in entering judgment for appellee was clearly right.

Respectfully submitted,

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